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No. ——

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1982

WILLIAM A. BORDERS, JR.,
*Petitioner,*

v.

UNITED STATES OF AMERICA,
*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

MITCHELL, SHORTER & GARTRELL

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TO: The Honorable Chief Justice of the United States and The Honorable Associate Justices of the Supreme Court of the United States:

The petitioner respectfully prays that a writ of certiorari issue to review the final order of the United States Court of Appeals for the Fifth Circuit entered on December 10, 1982, that affirmed the judgment and conviction entered against the petitioner in the United States District Court for the Northern District of Georgia, Atlanta Division CR-82-72-A "K".

## QUESTION PRESENTED FOR REVIEW

In a federal criminal case where the indictment charges two persons with offenses, including conspiracy, allegedly arising out of a scheme to bribe a federal judge, and only one of the two persons is on trial, is it not a violation of the Fifth Amendment due process rights of the accused for the Government to be permitted over objection to present evidence of the "flight" of the untried defendant that occurred after the alleged conspiracy had terminated.

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## OPINIONS BELOW

There was an opinion in the United States District Court in this case dealing with the question presented in this petition. It is an unreported opinion and is found in the Appendix.

There was an opinion of the United States Court of Appeals in this, in the form of a published memorandum, which is not yet reported, but is cited as United States Court of Appeals, Eleventh Circuit, No. 82-8302, and is found in the appendix.

## JURISDICTION

The Jurisdiction of this Court is invoked under section 1254(1) of Title 28 of the United States Code.

## CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

Fifth Amendment To The United States Constitution:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

26 United States Code

§ 371:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any aegncy thereof in any man-

ner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000.00 or imprisoned not more than five years, or both.

## STATEMENT OF THE CASE

### I. PROCEEDINGS

*A. U.S. District Court*

An indictment was returned in the District Court for the Southern District of Florida against the petitioner William A. Borders, Jr. (a Washington, D.C. attorney) and Alcee L. Hastings (a United States District Judge for the Southern District of Florida). The indictment was in four counts, and charged: Conspiracy to corruptly solicit and receive money in return for Judge Hastings' being influenced in his performance of official acts as a United States District Judge, and to defraud the United States in connection with the performance of lawful Governmental functions, in violation of 18 U.S.C. § 301 (Count 1); unlawfully and corruptly influencing, obstructing and impeding and endeavoring to influence, obstruct and impede the due administration of justice, in violation of 18 U.S.C. § 1503 (Count 2); unlawfully traveling in interstate commerce with the intent to promote, establish, carry on and facilitate the promotion, establishment and carrying on of the unlawful activity of bribery, in violation of 15 U.S.C. § 1952 (Counts 3 and 4). Judge Hastings and the petitioner were charged both as principals, and as an aider and abettor of the acts of each other (18 U.S.C. § 2). Only the petitioner was charged with the Counts three and four offenses.

The pre-trial motion of the petitioner Borders for a change of venue was granted, causing a severance of his case for trial from that of Judge Hastings. The petitioner's trial proceeded first (on March 22, 1982), in Atlanta,

Georgia. On March 29, 1982, the jury found the petitioner guilty on all four counts. The petitioner's motion for new trial was heard on the day of sentencing, and was denied by the District Judge. (App. pp. 1-5). The petitioner was sentenced to a concurrent term of imprisonment of 5 years on each of the four counts and fined in an aggregate amount of $35,000.00.

*B. U.S. Court of Appeals*

The petitioner's conviction was appealed to the Eleventh Circuit. In the appeal the petitioner raised several claims of trial error, in: admitting evidence of the "flight" of Judge Hastings; giving a jury instruction on the subject of "flight"; and, the wording of the instruction on character evidence. In a decision rendered on December 10, 1982, the Court of Appeals affirmed the judgment of the District Court. (App. pp. 6-19).

## II. THE GOVERNMENT'S TRIAL EVIDENCE

*A. Generally*

In December 1980 two brothers, Frank and Thomas Romano, were convicted of racketeering and related charges after a jury trial before Federal District Court Judge Alcee L. Hastings in the Southern District of Florida. On May 4, 1981, Judge Hastings ordered the forfeiture of $1.2 million in racketeering related property belonging to the Romanos; and on July 8, 1981, sentenced each Romano to three years in prison.

In September 1981, the F.B.I. received allegations about the petitioner concerning the Romano case. A plan was formed by the F.B.I. for the petitioner to meet with an undercover agent posing as Frank Romano. A retired F.B.I. agent named Paul Rico was selected to play the part of Frank Romano. The petitioner traveled to

Miami on September 12, and met with Rico, whom he believed was Frank Romano. In their discussions the petitioner proposed that for $150,000.00 an order would be signed in ten days returning a substantial amount of the Romano's forfeited property and that reduced sentences for the Romanos would come later. To test the petitioner's ability to do what was proposed, the petitioner was to have the Judge go to dinner at a time and place selected by Rico. Rico suggested the main dining room at the Fontainbleu Hotel at 8:00 p.m. the following Wednesday. At the appointed date and time, Judge Hastings appeared at the Fontainbleu with a young lady and had dinner.

On September 19, pursuant to arrangements made at the earlier meeting, Borders again traveled to Miami and met with Rico. At this meeting Rico gave the petitioner $25,000.00 as an installment.

On October 1, the Government installed court-authorized wiretaps on the petitioner's law office and home telephones. There were telephone calls between Rico and the petitioner on October 3 and 4 concerning the status of the order. The petitioner was not able to furnish any information about the order until October 5, when the petitioner told him that "the matter" 'had' "been taken care of" and that it would be in the mail, "today or first thing in the morning." (Tr. 725-728)[1] Within an hour after this call, Judge Hastings called the petitioner. On the next day (October 6, 1981), an order was issued by Judge Hastings reversing in part the $1.2 million forfeiture order in the Romano case, and returning $845,000.00 in property to the Romanos. The order was consonant with the then recent decisions

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[1] Refers to the transcript of the trial proceedings.

of the Fifth Circuit in *United States v. Martina* and *United States v. Peacock* that had been decided in June and August, 1981, respectively. On October 5, Judge Hastings instructed his law clerk, Jeffrey Miller, who was working on the Romano case that he wanted the order in the Roman case done "today". (Tr. 638)

In a telephone call on October 7, Rico informed the petitioner that he had received word of the order and he was satisfied. He talked about arrangements for the completion of the payoff and agreed to come to Washington. Rico came to Washington on the evening of October 8, 1981. The F.B.I. provided him with a room at the Twin Bridges Marriott in Arlington, Virginia and with $125,000.00 in cash for his meeting with the petitioner.

A formal celebration had been scheduled for the evening of October 9th to honor the petitioner with a dinner and a Potomac River cruise with a party later at the L'Enfant Plaza Hotel in Washington, D.C. Judge Hastings had planned to attend these affairs. The petitioner made reservations for the Judge to be at the L'Enfant Plaza Hotel during his stay in Washington. The petitioner met Judge Hastings at the airport on the morning of October 9th, and took him first to the L'Enfant Plaza Hotel, where they checked in, and then they drove to the petitioner's law office. There, the petitioner returned a call to "Frank" (Rico) and agreed to meet him at the Marriott within the hour. He went to meet Rico; and after Rico entered the petitioner's car carrying $125,000.00, F.B.I. agents arrested the petitioner.

*B. The Government's Evidence of the "Flight" of Judge Hastings*

On the afternoon of October 9th, Judge Hastings was at the L'Enfant Plaza Hotel lunching with Hemphill Pride

of Columbia, South Carolina. Pride was a close friend of the Judge and the petitioner. He had come to Washington with his family to participate in the party for the petitioner.

Pride was a Government witness at the trial.[2] He testified that after his luncheon and a few drinks with the Judge in the hotel's cocktail lounge, he returned to his room. There, he received a telephone call from the petitioner's attorney that advised him that the petitioner had been arrested. Pride said he was told that "the charge pending agains Borders involved some bribery that took place in Jude Hastings' courtroom"; and further, that the F.B.I. was looking for Judge Hastings to interview him. The attorney gave Pride the name and telephone number of two F.B.I. agents with the request that he ask Judge Hastings to call them. (Tr. 821-822) Pride sought out Judge Hastings in the hotel and related to him what the attorney had said. Judge Hastings appeared to be shocked and astonished. Hastings asked Pride what should he do. Pride told him that he though it would be in the Judge's best interest to go back to Florida where he could get his lawyer to look into the matter, and to find out exactly what it was about. The two men went to the Judge's room, where, with the help of Pride, the Judge packed his belongings. Next, they went to the lobby; and from there the Judge went to the Baltimore/Washington International Airport and boarded a 6:30 p.m. flight to Ft. Lauder-

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[2] Petitioner's counsel had previously objected to the testimony of Pride as it concerned the activities of Judge Hastings on October 9, 1981, after the arrest of the petitioner (Tr. 759-761). Counsel and the Court had a discussion in chambers about the admissibility of Pride's testimony. (Vol. 9, pp. 1-19). Before he was called before the jury, Mr. Pride's testimony had been briefly heard on voir dire, out of the presence of the jury, for the Court to make a determination as to its admissibility (Tr. 774-790). After hearing the testimony, the Court ruled it admissible.

dale, Florida. When he reached Ft. Lauderdale, he went to the apartment of his fiance. That evening two F.B.I. agents came to the apartment looking for the Judge. He presented himself to them and submitted to a two- to three-hour interview.

In further regard to the actions of Judge Hastings upon learning of the petitioner's arrest, the Government proved the following facts: (1) Judge Hastings made no phone calls before he left the hotel; (2) Judge Hastings left the hotel without checking out; (3) He departed the hotel without picking up a suit that he had given the hotel to be cleaned; (4) Pride offered to drive Judge Hastings to the airport and the Judge said no, "you are with your family, I don't want you to get involved. I will go on my own" (Tr. 804); (5) The Judge's departure represented a change in his plans, as his original ticketing was for a flight to Orlando, Florida on October 11th; (6) the airport that the Judge departed from was 32 miles from Washington, whereas the Washington National Airport was close to the hotel; and (7) There was a flight departing National Airport for Miami at 4:25 p.m. that had available seats.

## REASON RELIED ON FOR THE ALLOWANCE OF THE WRIT

This case raises a unique, but important, question of federal evidentiary law that needs to be decided by this Court. It is: whether it comports with an accused's right to due process, assured by the Fifth Amendment, to admit into evidence against him, when he alone is on trial, the flight of an alleged co-conspirator, which occurs after the conspiracy has ended. The rule of *Lutwak v. United States*, 344 U.S. 604 (1953), is that the post-conspiratorial "acts of a conspirator or others which were relevant to prove the conspiracy" are admissible (314 U.S., at p. 618).

Does this rule likewise apply to the non-verbal behavioral assertions of a co-conspirator, such as flight, which occurs after the conspiracy has ended. It would seem not, for *Lutwak* contemplates that the acts which are admissible under the rule are those, "which are not intended to be a means of expression" *id.* There is a difference between acts, on the one hand, that are unequivocal (such as the ones in *Lutwak*) that logically prove the intention of the parties and the membership of the conspiracy, and those on the other hand, which are "ambiguous human behavior at or beyond the outer edge of the hearsay area",[3] such as flight. The difference is not subtle or discrete, but is a marked one. The inherent natural difference between the two, calls for distinctly diametric evidentiary treatment. There is a void on this subject in federal law, and the problem is rooted in this case. It was dealt with by the lower Courts erroneously, and in a way that prejudiced the due process rights of the petitioner. The wrong can only be remedied by allowance of this Court's writ of certiorari to review the judgment of the Circuit Court.

## ARGUMENT

Two facts set this case apart from the ordinary one involving the admissibility of the post-conspiratorial conduct of an alleged co-conspirator. The first is that only the petitioner was on trial. The other is that the evidence admitted against him was the flight of the alleged co-conspirator. The concurrence of these two facts created a situation for the petitioner that impinged upon his substantive and procedural due process rights. The petitioner's position at trial was inextricable and defenseless as to the evidence of Judge Hastings' "flight". His predicament

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[3] Maguire, the Hearsay System: Around and Through the Thicket. 17 Vanderbilt Law Review (1961) 741, p. 760.

abounded with the unfair prejudice referred to in Rule 403 of the Federal Rules of Evidence.[4]

This Court has repeatedly "deprecated the evidentiary value of flight":[5] *Hickory v. United States,* 160 U.S. 408 (1896); *Alberty v. United States,* 162 U.S. 499 (1896); *Allen v. United States,* 164 U.S. 492 (1896); *Starr v. United States,* 164 U.S. 627 (1897); *Wong Sun v. United States,* 371 U.S. 471, 483-84 n.10 (1963). This criticism arises in cases where the flight evidence concerns the defendant who is on trial. Consider then the case, such as this one, where the flight is that of another. Whether flight be regarded as an admission pursuant to Rule 801(d)(2)(A), or as conduct offered as circumstantial evidence, rather than for its assertive, testimonial value (see, *United States v. Lobo* (2 Cir., 1925) 516 F.2d 883, 884 n.1, cert. den. 423 U.S. 837), its use is circumscribed. The assertive conduct (whether verbal or non-verbal) of a person is always admissible against that one (*United States v. Perez* (9 Cir. 1981) 658 F.2d 654, 659, nts. 374; *United States v. Lobo, supra;* but not against a co-conspirator.

> "However, assertive conduct or declarations made by one conspirator 'either before the formation or after the termination of the conspiracy are not admissible against a co-conspirator'. [citation omitted] The rationale underlying the exclusion of such statement 'is the lack of any opportunity for the adversary to cross-examine the absent declarant whose out-of-court statement is introduced into evidence . . .'" *United States*

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[4] "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of unude delay, waste of time, or needless presentation of cumulative evidence."

[5] *Miller v. United States,* (D.C. Cir. 1963) 320 F.2d 767, 770.

*v. Morris* (10 Cir. 1980) 623 F.2d 145, cert. den. 449 U.S. 1065.

In order to clarify the question for the federal judiciary that post-conspiratorial non-verbal assertive acts of one conspirator are not admissible against another, certiorari should be granted in this case.

Respectfully submitted,

MITCHELL, SHORTER & GARTRELL

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*Attorney for Petitioner*

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a copy of the foregoing Petition was mailed, postage prepaid, this 25th day of January, 1983, to: Reid Weingarten, Esquire, Public Integrity Section, Criminal Division, Department of Justice, P.O. Box 0168; and Solicitor General, United States Department of Justice, Washington, D.C. 20530.

By: /s/ JOHN A. SHORTER, JR.
John A. Shorter, Jr.

[Filed in Open Court 5/7/82; Ben H. Carter, Clerk]

**UNITED STATES DISTRICT COURT**
**NORTHERN DISTRICT OF GEORGIA**
**ATLANTA DIVISION**

**Case No. CR 82-75-A**

UNITED STATES OF AMERICA,

*Plaintiff,*

v.

WILLIAM A. BORDERS, JR.,

*Defendant.*

## MEMORANDUM AND ORDER DENYING DEFENDANT BORDERS' MOTION FOR A NEW TRIAL

Presently before the Court is defendant Borders' motion for a new trial, pursuant to Fed. R. Crim. P. 33. In support of his motion, defendant asserts that in the course of pretrial and trial proceedings, the Court committed four errors prejudicial to the defendant's rights. The motion has been briefed and argued. For the reasons to be briefly stated, the motion is denied.

(1) Defendant first contends that the Court erred in denying his pretrial motion to dismiss Counts Three and Four of the indictment for violation of the Speedy Trial Act, 18 U.S.C. § 3161(b). In its memorandum and order denying defendant's motion, the Court rejected this contention. Defendant has presented no argument which was not thoroughly considered by the Court at that time, and

the Court remains persuaded that no violation of the Speedy Trial Act occurred in this case. *See also United States v. MacDonald*, 50 U.S.L.W. 4347, 4349 (U.S. March 31, 1982).

(2) Defendant next argues that the Court erred in admitting evidence of defendant Hastings' departure from Washington on October 9, 1981, after the arrest of defendant Borders (the so-called "flight" evidence). Again, this argument was rejected by the Court during the trial. *See* Transcript of March 25 Chambers Conference 2-23; Trial Transcript 759-60, 770-93. Counsel have presented no argument which was not thoroughly considered by the Court at that time, and the Court remains persuaded that the evidence was properly admitted under the principles established by controlling Fifth Circuit law. *See, e.g., United States v. Mesa*, 660 F.2d 1070, 1078 (5th Cir. 1981); *United States v. Stewart*, 579 F.2d 356, 359 & n.3 (5th Cir.), *cert. denied*, 439 936 (1978); *United States v. Myers*, 550 F.2d 1036, 1049 (5th Cir. 1977), *cert. denied*, 439 U.S. 847 (1978). *See also Lutwak v. United States*, 344 U.S. 604, 617-18 (1953); *United States v. Anderson*, 417 U.S. 211, 219-21 (1974).

(3) Defendant appears to argue that even if the flight evidence was properly admitted, it was improper for the Court to instruct the jury on the subject of flight. Defendant does not argue that the instruction itself was deficient in any respect, but rather that the giving of he instruction unfairly prejudiced him. The Court disagrees. The evidence being properly admissible, a flight instruction was not only appropriate, but, as a cautionary instruction benefiting the defendant, was probably required. *See, e.g., United States v. Mesa, supra*, 660 F.2d at 1078; *United States v. Hernandez-Miranda*, 601 F.2d 1104, 1106-07 (9th Cir. 1979); *United States v. Register*, 496 F.2d 1072

(5th Cir. 1974), *cert. denied sub nom. Cochran v. United States*, 419 U.S. 1120 (1975).

(4) Finally, defendant argues that the Court's "character evidence" instruction wast flawed.

The Court charged the jury on character evidence as follows:

> Now, the Defedant in this case has called character witnesses in this case who have testified as to Mr. Border's good reputation for honesty, integrity, probity and morality and also have given their personal opinions as to his good character. You should understand that, of course, a good reputation is not a defense to a criminal charge. Nevertheless, the law allows such evidence of character, and you should consider it along with all the other evidence in this case since evidence of a defendant's good character may give rise to reasonable doubt that such a person would commit a crime with which he is charged. But if on all the evidence you are satisfied beyond a reasonable doubt that the Defendant is guilty, a showing that he has previously enjoyed a reputation of good character will not justify or excuse the offense, and you should not acquit the Defendant merely because you believe he may have been a person of good repute. In this connection, I further charge you that the testimony of a character witness is not to be regarded by you as expressing that witness' opinion as to the guilt or innocence of the Defendant of the offense with which he is charged. The guilt or innocence of Mr. Borders in this case is for you as the jury and for you alone to determine from all the evidence in this case.

Trial Transcript 1164-65.

Defendant contends that the inclusion of an instruction that "a reputation of good character will not justify or excuse the offense" conveyed the mistaken impression that the jury was to treat the character evidence in a different manner than that in which it considered all other evidence,

contrary to the rule set forth in *Edgington v. United States*, 164 U.S. 361 (1896).* In support of this position, defendant cites a line of Fifth Circuit cases beginning with *United States v. Leigh*, 513 F.2d 784 (5th Cir. 1975), and culminating with a lengthy discussion in *United States v. Callahan*, 588 F.2d 1078 (5th Cir. 1978), *reh. denied*, 591 F.2d 1343, *cert. denied*, 444 U.S. 826 (1979). *See also United States v. Furr*, 528 F.2d 578 (5th Cir. 1976); *United States v. Lange*, 528 F.2d 1280 (5th Cir. 1976); *United States v. Harris*, 533 F.2d 306 (5th Cir. 1976). After carefully reviewing these cases, the Court remains satisfied that the instruction, read as a whole, stated the correct legal rule, as set forth in *United States v. Callahan, supra*, 588 F.2d at 1085, that "good character should be considered together with all other evidence in a case and may of itself give rise to a reasonable doubt." Unlike the charge found defective in *United States v. Leigh, supra*, which implied that the jury should consider the character evidence only *after* weighing all the other evidence in the case, the present charge expressly instructed the jury that it should consider [the evidence of character] *along with* all the other evidence in this case since evidence of a defendant's good character may give rise to a reasonable doubt that such a person would commit a crime with which he is charged." This language comports exactly with the basic rule announced in *Leigh* and restated in *Callahan* by instructing the jury that character evidence is to be considered together with all the evidence, and that it may give

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* Although defendant's counsel did object to the Court's charge on character evidence, Trial Transcript 1178-80, he did not raise the specific objection asserted now and did not call to the Court's attention the line of Fifth Circuit cases upon which he now relies. The Court was therefore denied an opportunity to consider whether the charge as given was in conformity with controlling Fifth Circuit law. *See* Fed. R. Crim. P. 30.

rise to a reasonable doubt of defendant's guilt. Indeed, in the present case the Court emphasized the rule when it concluded its charge on character evidence by stating:

> The guilt or innocence of Mr. Borders in this case is for you as the jury and for you alone to determine from all the evidence in this case.

In any event, the Court is convinced that any error in the character instruction was harmless and could not in any way have prejudiced the defendant. Not only was the evidence of defendant's guilt overwhelming, but the testimony as to Borders' good character was inconsistent with his defense. In closing argument, defendant's counsel focused on asserted weaknesses in the government's proof that Hastings was aware of Borders' activities, and expressly suggested to the jury that Borders was playing a "scam" on the Romanos, that Hastings was not involved in the scam, and that therefore no conspiracy to commit bribery had been proved. Trial Transcript 1109-10. To accept this argument, the jury would have had to disbelieve the character evidence. Under these circumstances, and considering the weight of the uncontradicted evidence offered by the government at trial, it is inconceivable that a different instruction on Borders' character evidence would have resulted in an acquittal in this case.

* * * * *

Defendant Borders' motion for a new trial is denied.

IT IS SO ORDERED.

Dated at Atlanta, Georgia, this 7th day of May 1982.

EDWARD J. GIGNOUX

*United States District Judge*

Serving by Designation

UNITED STATES OF AMERICA,
*Plaintiff-Appellee,*

v.

WILLIAM A. BORDERS,
*Defendant-Appellant.*

No. 82-8302.

United States Court of Appeals,
Eleventh Circuit.

Dec. 10, 1982.

Appeal from the United States District Court for the Northern District of Georgia.

Before JOHNSON and ANDERSON, Circuit Judges, and HUNTER,* District Judge.

JOHNSON, Circuit Judge:

This is an appeal by William A. Borders from his conviction for his involvement in a conspiracy to solicit and accept a bribe in exchange for influencing the outcome of a case pending in the courtroom of his close friend, United States District Judge Alcee L. Hastings.[1] Both Judge Hastings and Borders were indicted for conspiracy and for corruptly impeding the administration of justice; Borders alone was also indicted for unlawfully travelling in interstate commerce with intent to commit bribery.[2] Borders'

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* Honorable Edwin F. Hunter, Jr., U.S. District Judge for the Western District of Louisiana, sitting by designation.

[1] Judge Hastings has been a district judge in the Southern District of Florida since 1979.

[2] Specifically, Count One charged Borders and Hastings with, *inter alia*, conspiracy to corruptly solicit and accept "in return for defendant Alcee L. Hastings being influenced in his performance

trial was severed from that of Hastings,[3] and venue was changed from the Southern District of Florida to the Northern District of Georgia. At trial, to support the conspiracy count against Borders the government introduced evidence as to the so-called flight of Judge Hastings on the day that Borders was arrested. Borders' defense consisted primarily of denying any conspiratorial involvement by Hastings and of introducing several character witnesses who testified in support of Borders. The jury found Borders guilty on all four counts, and he was sentenced to four current five year prison terms and fined a total of $35,000. In this appeal, Borders cites as trial error the admission of the flight evidence, the jury instruction on flight, and the jury instruction on character evidence. We affirm.

I.

In December 1980, Frank Romano and Thomas Romano were convicted after a jury trial in Judge Hastings' courtroom of twenty-one counts of racketeering and related charges. On May 4, 1981, Judge Hastings ordered

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of official acts as a United States District Judge," and to defraud the United States in connection with the performance of lawful government functions, in violation of U.S.C.A. § 371. Count Two charged that Borders and Hastings "did corruptly influence, obstruct and impede and endeavor to influence, obstruct and impede the due administration of justice" and aided and abetted each other, in violation of 18 U.S.C.A. §§ 2 and 1503. Count Three charged that Borders travelled from the District of Columbia to Florida on or about September 11 and 12, 1981 with intent to commit bribery, in violation of 18 U.S.C.A. § 1952; Count Four charged the same facts on or about September 18 and 19, 1981.

[3] On February 1, 1982, Hastings moved to quash his indictment on the ground that the federal district court does not have jurisdiction to try an active federal judge until he is removed from office through the impeachment process. The trial court denied the motion on February 17, 1982, and this Court affirmed. *United States v. Hastings*, 681 F.2d 706 (11th Cir. 1982), *petition for cert. filed*, 51 U.S.L.W. —— (No. 82-863, Nov. 22, 1982).

the forfeiture of $1.2 million worth of the Romanos' racketeering-related property under 18 U.S.C.A. § 1963(a), the forfeiture provision of the Racketeer Influenced and Corrupt Organizations statute.[4] After receiving certain tips from an informant named William Dredge, who was a former client of Borders, the FBI in September 1981 began an investigation into the Romano proceedings.

In the presence of an FBI agent, Dredge called Borders on September 10, 1981, and, after telling Borders "My men are ready to deal," arranged to meet him at Miami Internaitonal Airport on September 12 for the purpose of introducing him to Frank Romano. Borders later that day placed two calls to Judge Hastings' chambers in Miami.[5] The next day, September 11, FBI agents followed Judge Hastings from the United States Courthouse in Miami to the airport. Two short calls from pay telephones at the airport to Borders' office were charged to Hastings' home telephone. At 4:20 p.m., Borders' secretary took a message for Borders from Hastings that read "Flight further delayed, not leaving until 5:00." Hastings arrived that night at Washington National Airport at about 8 p.m. Borders, who apparently had been scheduled to leave National Airport for Miami at 7:30 p.m., changed his flight so as to depart at about 9:25 p.m.—thus providing Borders and Hastings with time to meet at National Airport.

For the September 12 meeting in Miami with Borders, the FBI selected retired FBI agent Paul Rico to pose as

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[4] Borders, a Washington, D.C. attorney, never appeared as counsel of record in any of the Romano proceedings.

[5] The calls occurred at 4:40 p.m. and 5:34 p.m. Hastings in turn left two telephone messages that day with Borders. The first, taken at 9:35 a.m., read "Not coming to D.C. today. Call him between 4:30 and 5:00 today. Will be in his office for call." The second, at 5:10 p.m., was "He'll be waiting for call. Have him get off the bench. He'll also let them know if you called. Get him to phone."

Frank Romano. Dredge, Rico, and Borders met at 8:40 a.m. at the Miami airport restaurant. Dredge introduced Rico to Borders, telling Borders "You're in good hands," and then left Rico and Borders alone. According to a tape of their conversation,[6] Borders asked Rico, "You know what the number is, right?" After Rico hesitated, Borders wrote "$50,000" on a piece of paper and then wrote "within ten days an order will be signed returning a substantial amount of property." Borders also told Rico that the "other"—apparently meaning reduced prison sentences for the Romanos—would come after Rico (Romano) withdrew a pending appeal and filed a motion in district court for mitigation of sentence. Rico hesitated, so Borders offered to have Dredge hold the money "until the first part is done," explaining, "[I] don't want you filing a motion and withdrawin' your appeal without knowin' somethin' gonna be done." Rico objected to using Dredge, preferring to deal directly with Borders, and suggested that he and Borders agree upon some procedure whereby Borders could prove his influence with Judge Hastings. Apparently Borders had previously suggested that Rico name a time and place for Hastings to eat dinner; Rico now repeated this suggestion.[7] Rico named the main dining room at the

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[6] Rico wore a concealed body recorder to each meeting with Borders.

[7] The conversation as to the proposed dinner was as follows:

RICO: . . . I think you had made the suggestion that, ah, we name a place . . .
BORDERS: Okay. No sweat.
RICO: . . . and a time . . .
BORDERS: Okay.
RICO: . . . and that, ah, the jud, your ah . . .
BORDERS: That somebody would have dinner there.
RICO: Yea.
BORDERS: Okay.
RICO: And he could order, ah, you know, something, we would know (unintelligible).
BORDERS: Okay.

Fontainbleu Hotel in Miami Beach at 8 p.m. on September 16. Before the two departed, they agreed to meet again at the same location at 10 a.m. on September 19, so that Rico could "put something up front."

On September 16, FBI agents observed Judge Hastings arriving for dinner at the main dining room of the Fontainbleu Hotel at 7:45 p.m.—just as Rico had suggested.

Borders and Rico met for the second time as planned at the Miami airport on September 19. After Borders told Rico that the Romano property would be released within ten days, he instructed Rico on the procedure to be used for obtaining mitigation of sentence.[8] Rico then gave Bor-

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RICO: In other words . . .
BORDERS: Okay.
RICO: . . . what happened. The only thing is, now, how do I know, how am I gonna get to, ah, know, ah, ah, you know, when he's available for it, ah, do you want to call me and tell me when?
BORDERS: No, we can set that up now.
RICO: Okay, okay.
BORDERS: You name a place now. Wednesday of next week for dinner.

[8] Borders explained the procedure as follows:
RICO: . . . before we go any further, ah, ah, the last time we, we talked, my understanding was that the, ah, some property was going to be released.
BORDERS: Within ten days.
RICO: Within ten days of the last time we talked, right?
BORDERS: No, within ten day from today.
RICO: Oh, today?
BORDERS: Yea. We're not talkin' about that many different days.
RICO: Oh.
BORDERS: (laughs)
RICO: Yea, right, right, right. Okay, then, ah . . .
BORDERS: Once you do that then file a motion for mitigation of sentence, but don't do that until that happens.
RICO: Right, right, right, right, right. In a, as a matter of fact, ah, the, ah, I'm not havin' any, ah, discussions with my, ah, attorney over any of this, ah, bullshit, except the, ah, except the, to tell him, ah . . .

ders an envelope containing $25,000 in $100 bills as "up front" money; they agreed that the remainder was to be paid at a later time.[9]

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BORDERS: Just tell him you're tired of the appeal, just see if the man will reduce your sentences.
RICO: I see.
BORDERS: And that'll take ya.
RICO. Okay.
BORDERS: Um hum.
RICO: Okay.
BORDERS: And don't talk about it to nobody, about you.

[9] There was some disagreement as to the method of payment:
RICO: Um, ah, there's a, um, ah, there's twenty-five, ah, right there and that's going to be, ah, my indication that, ah, everything is fine, and, ah, I feel that when the, when the next transaction takes place in ten days, I'll come up with another twenty-five and then the remaining hundred on the, ah, on the culmination.
BORDERS: That's different than what we had said:
RICO: What we had said is, ah, is I give you, ah, up front money for, ah, this thing here, you know, it . . .
BORDERS: Well?
RICO: That's my understanding, what is, what is, what do you . . .
BORDERS: My undertsanding was, I thought you would put up some big escrow.

* * * * *

BORDERS: Ah, well, okay, do it this way. Ah, see, the problem is, I don't want to keep coming back and forth, down.
RICO: No, I can understand that, you know.
BORDERS: Secondly.
RICO: You want me to go someplace else, you know?
BORDERS: No, no.
RICO: This, this is very important to me.
BORDERS: Yea, well, I can understand your position at this point.
RICO: Alright.
BORDERS: What about as soon as the other is done. Get it all up, then, as soon as he (unintelligible).
RICO: Alright, alright, alright. I think that, that, ah, um, alright, that's okay, so the, ah, the balance, okay, now, ah, do you have any idea on the, on the timing so that you figure out, ah, when you want this thing to happen, ah, because, ah, and how do you, and how do you want this, that's all in hundreds.
BORDERS: That's fine.

There was no further contact between Rico and Borders until Rico called Borders at 3:10 p.m. on Friday, October 2, shortly after the government had installed court-authorized wiretaps on Borders' home and office telephones. Rico inquired as to the status of the forfeiture order; Borders was uncertain as to what had happened and suggested that Rico call him at home on Sunday, October 4. Borders attempted to call Hastings a little over an hour after talking to Rico, but Hastings' secrettary indicated that he had left for the day.

Rico called Borders again at 9:30 Sunday morning. Borders told Rico that he "ha[dn't] been able to talk to anybody" and suggested that Rico call him at the office the next day. When Rico called Borders at 4:30 p.m. on Monday, October 5, Borders said that "the matter" had "been taken care of" and that Judg e Hastings' order probably would be mailed out "today or first thing in the morning." Shortly afterwards, Judge Hastings called Borders and the following conversation occurred:

BORDERS: Yes, my brother.
HASTINGS: Yey, my man.
BORDERS: Um hum.
HASTINGS: I've drafted all those, ah, ah, letters, ah, for him . . .
BORDERS: Um hum.
HASTINGS: . . . and everything's okay. The only thing I was concerned with was, did you hear if, ah, hear from him after we talked?
BORDERS: Yea.
HASTINGS: Oh. Okay.
BORDERS: Uh huh.
HASTINGS: Alright, then.
BORDERS: See, I had, I talked to him and he, he wrote some things down for me.
HASTINGS: I understand.
BORDERS: And then I was supposed to go back and get some more things.

HASTINGS: Alright. I understand. Well then, there's no great big problem at all. I'll, I'll see to it that, ah, I communicate with him. I'll send the stuff off to Columbia in the morning.
BORDERS: Okay.
HASTINGS: Okay.
BORDERS: Right.
HASTINGS: Bye bye.
BORDERS: Bye.

The next day, October 6, Judge Hastings issued an order which reversed in part the original $1.2 million forfeiture order, returning over $845,000 in forfeited property to the Romanos.

Between the issuance of the original forfeiture order and the October 6 order, the Fifth Circuit handed down *United States v. Martino*, 648 F.2d 367 (5th Cir., 1981), *cert. denied*, —— U.S. ——, 102 S.Ct. 2006, 72 L.Ed. 2d 465 (1982), which reversed a forfeiture order similar to the one entered in the Romano case.[10] At the Romanos' sentencing hearing on July 8, 1981, Judge Hastings considered whether in light of *Martino* the May 4 order should be reversed. According to the transcript of the hearing and the testimony of the Justice Department attorney who prosecuted the Romanos, Hastings orally affirmed the May 4 order after hearing extensive argument as to the meaning of *Martino*.[11] About seven weeks after the hearing,

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[10] The relevant portion of this opinion was not printed in the federal reporter, however, because the Fifth Circuit agreed to rehear the case en banc. On August 2, 1982—well after the Romano forfeiture proceedings had run their course—the en banc Court vacated the portion of the panel decision that reversed the trial court's forfeiture order, and affirmed the order as entered. *United States v. Martino*, 681 F.2d 952 (5th Cir.) (en banc).

[11] At trial, the Justice Department attorney read from the July 8 hearing transcript as follows:

> The Court: All right, I am prepared at this time to deny your motion, Mr. Sonnett, and I will give a brief written order with reference to the request. I will allow the forfeitures as previ-

the Fifth Circuit followed *Martino* in *United States v. Peacock*, 654 F.2d 339, 351 (5th Cir. August 27, 1981). Judge Hastings' law clerk told the judge about *Peacock* in early September, and Hastings responded by saying "give them [the Romanos] their money back." As of October 5, however—the day of the Borders-Hastings telephone conversation reproduced above—the clerk had not completed work on the new order. On that day the judge went to the law clerk and told him to "Do the order . . . I want the order today." According to the clerk's testimony, such behavior was "unusual" for Judge Hastings and "not in the ordinary course of things." The order was drafted, typed, and mailed by 6:00 p.m. on October 6.

Rico called Borders at midday on October 7, inquiring again about the status of the order; Borders told him that "It went out yesterday morning." [12] Rico called again that night to tell him that he had received word of the order and was satisfied. They then discussed arrangements for the final payoff, which was to occur on October 9. Rico offered to travel to Washington, which Borders agreed to, telling Rico to call when he got into town.

A testimonial dinner in honor of Borders, who had been a president of the National Bar Association, was planned to take place in Washington on Friday evening, October 9. On Thursday, October 8, Hastings called Borders to tell him that he would arrive in Washington at

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ously set out by the Court to be maintained and, as indicated, a brief order will be prepared that will recite the reasoning of the Court, at least insofar as the new matters that have arisen, more specifically, the cases cited by counsel up to this time.

[12] In fact, the order went out in the evening of the 6th; obviously Borders was relying on his October 5 conversation with Hastings.

10:40 the next morning.[13] Borders picked him up at the airport on Friday morning and the two travelled to L'Enfant Plaza Hotel, where a suite and an adjoining room had been reserved in their names. Shortly afterwards, Borders and Hastings went to Borders' law office downtown, where Borders picked up a message to call "Frank" at the Twin Bridges Marriott Hotel in Washington.[14] Borders returned the call at 11:46 a.m.; Rico told Borders that "he had brought all the necessary papers." They agreed to meet at once at the Marriott.

Borders left Judge Hastings at the office and drove to the Marriott, arriving at Rico's room less than an hour after they had talked on the telephone. When Rico answered Borders' knock at the door, Borders asked Rico, "You got it with you?" Rico told him that "it" was in the room, and Borders said, "Get it, I want to take a ride." The two got into Borders' car and Rico placed a carrying bag containing $125,000 on the seat between them. The FBI pulled them over as soon as Borders started to drive out of the Marriott parking lot. When he saw the FBI car, Borders said to Rico, "We're busted."

In the meantime, Judge Hastings had lunch in his hotel room and then drinks in the cocktail lounge at the L'Enfant Plaza with Hemphill Pride, a close friend of Hastings and Borders. Pride had come to Washington for the dinner in honor of Borders and was also staying with his family at the hotel. When Pride returned to his room he immediately received a phone call from John

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[13] According to the testimony of Judge Hastings' secretary, Hastings' decision to travel to Washington was made at the last minute.

[14] Rico had arrived in Washington the night before. The FBI had secured a room at the Marriott and had installed video equipment in it for the purpose of recording the meeting between Borders and Rico.

Shorter, who was Borders' trial attorney. At trial Shorter asked Pride about their conversation. Pride testified as follows:

> The best I can recall, you told me—you asked me—did I know where the Judge was or could I get in contact with him? And I told you, yes, that he was either on his way to his room or in his room, and you then told me—described the situation that Mr. Borders had been arrested in Virginia and the best I can recall, you told me that the charges pending against Mr. Borders involved some bribery that took place in Judge Hastings' courtroom. You then told me that the FBI was looking for Judge Hastings, and that they wanted to interview him, and you gave me the name of two FBI agents and a telephone number and asked me to give this message to Judge Hastings and tell him to contact these agents.
>
> You also told me to tell Judge Hastings that you thought that he should have counsel present at the time that he was interviewed, and you suggested a lawyer from Washington by the name of Ken Monday. You then told me that you were leaving your office to go to Virginia, I think you said a bond hearing, but I got the impression that whatever you were going to was something in order to try to get him out, which I considered a bond hearing.

As soon as he finished his conversation with Shorter, Pride telephoned Hastings in his room and told him that he had an important message for him. The two met outside an elevator at the hotel and Pride related the contents of Shorter's phone call to Hastings. According to Pride's testimony, Hastings' reaction was one of shock, as if "he didn't know which way to move or what to do."Hastings asked Pride at least once what to do.[15] Pride told him that he could tell him nothing more than what

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[15] The evidence did not reflect that Hastings asked Pride any questions about the details of the alleged bribery "in [his] courtroom."

was in the phone call. Hastings asked for Shorter's telephone number, and Pride informed him that Shorter was with Borders. Pride then cautioned Hastings, "if you have got a problem, you would be in a better position on home court than here in Washington." [16] The two then proceeded to Hastings' room, where Pride helped Hastings pack his clothes. When Pride offered to give Hastings a ride to the airport, Hastings declined and said "You are with your family. I don't want you to get involved. I will go on my own." [17] Hastings made no phone calls in Pride's presence, did not pay his hotel bill upon departing, and did not pick up a suit he had left at the hotel cleaners.

Although the exact time of Hastings' departure for the airport is uncertain, it was withing thirty minutes to an hour of when he first learned of Borders' arrest. There was a 4:35 flight with seats available that afternoon from National Airport, which is four miles from the L'Enfant Plaza Hotel. Instead of travelling to National Airport, however, Hastings went to Baltimore-Washington Airport, 32 miles northeast of the hotel and over an hour away in Friday afternoon traffic.

Hastings landed in Miami that night and proceeded to the home of Patricial Williams, his fiancee. He arrived there between 9:30 and 10:00 p.m. and told her to expect a visit from FBI agents. Soon afterwards, two FBI

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[16] In addition, Pride suggested to Hastings that he go to Florida to obtain the services of a lawyer named Mavrides, who was a friend of Hastings. Although Hastings followed Pride's advice and returned to Florida, there is no evidence in the record to suggest that Hastings attempted to contact Mavrides before submitting to an FBI interview that occurred when he arrived in Florida later that night.

[17] The trial court excluded testimony by Pride that Hastings had also said Pride should not become involved because Pride, who had been convicted of a felony and was disbarred, was "on parole."

agents showed up and interviewed Hastings for two to three hours.

II.

[1] Because only Hastings and Borders were named as as conspirators in the indictment, the government had to prove Hastings' involvement in order to convict Borders for conspiracy. Accordingly, the government introduced evidence at trial tending to prove that immediately after learning of Borders' arrest Hastings fled from the L'Enfant Plaza Hotel. Appellant argues that the admission of this evidence was error because (1) evidence of flight is inherently unreliable and (2) the particular evidence in this case was too "uncertain and equivocal" to constitute flight. In reviewing these contentions, we note at the outset that "the ultimate decision on admissibility rests in the hands of the trial judge whose exercise of discretion in this regard will not be overturned absent clear abuse." *Scheib v. Williams-McWilliams Co.*, 628 F.2d 509, 511 (5th Cir. 1980).

Courts have long rejected the argument that evidence of flight is inherently unreliable. Over three quarters of a century ago, the Supreme Court announced that "the law is entirely well settled that the flight of the accused is competent evidence against him as having a tendency to establish his guilt." *Allen v. United States*, 164 U.S. 492, 499, 17 S.Ct. 154, 156, 41 L.Ed. 528 (1896). We have on numerous occasions affirmed the validity of our statement in *United States v. Ballard*, 423 F.2d 127, 133 (5th Cir. 1970) (quoting Wigmore) that: "[I]t is today niversally conceded that the fact of an accused's flight, escape from custody, resistance to arrest, concealment, assumption of a false name, and related conduct, are admissible as evidence of consciousness of guilt, and thus of guilt itself." *See, e.g., United States v. Three Hundred Sixty Four Thousand Nine Hundred Sixty Dollars in*

*United States Currency*, 661 F.2d 319, 324 (5th Cir. 1981); *United States v. Meneses-Davila*, 580 F.2d 888, 896 (5th Cir. 1978); *United States v. Stewart*, 579 F.2d 356, 359 (5th Cir.), *cert. denied*, 439 U.S. 936, 99 S.Ct. 332, 58 L.Ed.2d 332 (1978); *United States v. Myers*, 550 F.2d 1036, 1949-50 (5th Cir. 1977) (dictum), *appealed following remand*, 572 F.2d 506 (5th Cir. 1978), *cert. denied*, 439 U.S. 847, 99 S.Ct. 147, 58 L.Ed.2d 149 (1978); *United States v. Bowers*, 458 F.2d 1045, 1048 (5th Cir.), *cert. denied*, 409 U.S. 868, 93 S.Ct. 167, 34 L.Ed.2d 118 (1972); *Vick v. United States*, 216 F.2d 228, 232 (5th Cir. 1954). Other circuits have followed the same course. *E.g., United States v. Martinez*, 681 F.2d 1248, 1256-59 (10th Cir. 1982) ("The cases universally accept" the doctrine that flight evidence is admissible); *United States v. Jackson*, 572 F.2d 636, 639-41 (7th Cir. 1978) (dictum); *United States v. Rowan*, 518 F.2d 685, 691 (6th Cir.), *cert. denied*, 423 U.S. 949, 96 S.Ct. 368, 46 L.Ed.2d 284 (1975); *United States v. Greiser*, 502 F.2d 1295, 1299-1300 (9th Cir. 1974). Even courts that have expressed reservations as to the probative value of flight evidence have upheld its admission. *See, e.g., United States v. Robinson*, 154 U.S.App. D.C. 265, 475 F.2d 376, 384 (1973).[18]

Flight is viewed in the law of evidence as admission by

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[18] Although Borders' arrest effectively terminated the conspiracy, *see United States v. Flecha*, 539 F.2d 874, 876 (2d Cir. 1976), post-conspiracy acts of a co-conspirator are admissible. *Lutwak v. United States*, 344 U.S. 604, 617-18, 73 S.Ct. 481, 489, 97 L.Ed. 593 (1953) (distinguishing post-conspiracy declarations from post-conspiracy acts). *See also United States v. Hackett*, 638 F.2d 1179, 1186-87 (9th Cir. 1980) false exculpatory statements by co-conspirator not hearsay because not admitted for their truth, but rather only to show "consciousness of guilt"), *cert. denied*, 450 U.S. 1001, 101 S.Ct. 1709, 68 L.Ed.2d 203 (1981). Accordingly, we have on prior occasion supheld the admission of evidence of flight on the issue of the existence of a co-conspirator. *E.g., United States v. McLaughlin*, 578 F.2d 1180, 1184 (5th Cir. 1978).

conduct which expresses consciousness of guilt. E. Cleary, *McCormick on the Law of Evidence* § 271, at 655 (2d ed. 1972). Human experience teaches, however, that not every act of flight constitutes an expression of guilt. The Supreme Court explained long ago that:

> [I]t is not universally true that a man, who is conscious that he has done a wrong, "will pursue a certain course not in harmony with the conduct of a man who is conscious of having done an act which is innocent, right and proper;" since it is a matter of common knowledge that men who are entirely innocent do sometimes fly from the scene of a crime through fear of being apprehended as the guilty parties, or from an unwillingness to appear as witnesses. Nor is it true as an accepted axiom of criminal law that "the wicked flee when no man pursueth, but the righteous are as bold as a lion."

*Alberty v. United States*, 162 U.S. 499, 16 S.Ct. 864, 40 L.Ed. 1051 (1896). *See also Wong Sun v. United States*, 371 U.S. 471, 483 n. 10, 83 S.Ct. 407, 415 n. 10, 9 L.Ed.2d 4411 (1963) (quoting *Alberty*). Thus, the interpretation to be gleaned from an act of flight should be made cautiously and with a sensitivity to the facts of the particular case. Discussing evidence of flight in *United States v. Myers, supra*, 550 F.2d at 1049, we indicated that:

> Its probative value as circumstantial evidence of guilt depends upon the degree of confidence with which four inferences can be drawn: (1) from the defendant's behavior to flight; (2) from flight to consciousness of guilt; (3) from consciousness of guilt to consciousness of guilt concerning the crime charged; and (4) from consciousness of guilt concerning the crime charged to actual guilt of the crime charged.

The cases in which flight evidence has been held inadmissible have contained particular facts which tend to detract from the probative value of such evidence. *See*

*generally United States v. Martinez, supra,* 681 F.2d at 1257 (surveying cases). For example, in *United States v. Myers, supra,* we held flight evidence inadmissible [19] where the defendant might have fled because of guilt feelings about a different and unrelated crime that he had committed. *See* 550 F.2d at 1050. Moreover, the testimony of the arresting officers did not even clearly indicate that the defendant had in fact fled. *Id.* at 1049-50. An analogous situation occurred in the recent Fourth Circuit case of *United States v. Beahm,* 664 F.2d 414, 419-20 (4th Cir. 1981), which concluded that the trial court had committed error in instructing the jury on flight when at the time of his flight the defendant Beahm had been unaware that he was the subject of a criminal investigation.[20] Beahm fled shortly after receiving a note asking him to contact the FBI, but the note said nothing about wanting to arrest him or suspecting him of any crime, and it did not mention the incident in which Beahm allegedly was involved. *See also United States v. Jackson, supra,* 572 F.2d at 641. The *Beahm-Myers* line of cases thus stands for the proposition that the probative value of flight evidence is substantially weakened if the suspect was not aware at the time of flight that he was the subject of a criminal investigation for the particular crime charged.

The other line of cases in which flight evidence has

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[19] The principal objection to the evidence was that it was insufficient to support a jury instruction on flight, but for the same reason we concluded that "[t]he prejudicial effect of [the flight evidence] so far outweights its probative value that it should not be admitted on retiral. See Fed.R.Evid. 403." 550 F.2d at 1050 n. 20.

[20] It is not clear whether the Fourth Circuit would have reversed on this ground alone. The court held that the trial court had committed reversible error in admitting evidence of the defendant's prior convictions, and added the section on flight evidence at the end of its opinion "only because of the likelihood that it will arise again on retrial." 664 F.2d at 419.

been held inadmissible focuses on a related defect. In these cases, there exists a significant time delay from the commission of the crime, or the point at which the suspect becomes aware that he is the subject of a criminal investigation, to the time of flight. For example, in *United States v. Myers, supra,* 550 F.2d at 1050-51, the defendant fled between three and six weeks after the crime. In *United States v. Beahm, supra,* 664 F.2d at 420, the flight was three weeks after the crime.[21] A number of other cases in which the probative value of the flight evidence was doubted have pointed to similar lapses of time. *See e.g., United States v. Howze,* 668 F.2d 322, 324-25 (7th Cir. 1982) (four and one half months); *United States v. White,* 488 F.2d 660, 662 (8th Cir. 1973) (five months); *cf. United States v. Rowan,* 518 F.2d at 691 (flight instruction upheld where flight occurred thirty-six hours after crime). When the flight is not immediate, the inference of a consciousness of guilt weakens. As we said in *Myers, supra,* "[t]he immediacy requirement is important. It is the instinctive or impulsive character of the defendant's behavior, like flinching, that indicates fear of apprehension and gives evidence of flight such trustworthiness as it possesses. . . . The more remote in time the alleged flight is from the commission or accusation of an offense, the greater the likelihood that it resulted from something other than feelings of guilt concerning that offense." 550 F.2d at 1051.[22]

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[21] Because the *Beahm* court had already held that Beahm was unaware that he was the subject of a criminal investigation, the time between flight and the commencement of the investigation was not relevant.

[22] The Seventh Circuit, relying on this statement, suggested that "the importance of the immediacy factor would be greatly diminished, if not rendered irrelevant, when there is evidence that the defendant knows that he is accused of and sought for the commission of the crime charged." *United States v. Jackson, supra,* 572 F.2d at 641.

Reviewing the evidence concerning Hastings' flight, we see no defects that would render it inadmissible. Viewing the evidence in the light most favorable to the government, *see Glasser v. United States*, 315 U.S. 60, 80, 62 S.Ct. 457, 469, 86 L.Ed. 680 (1942), the government sufficiently established Hastings' activity on October 9 as flight. For example, his failure to call the FBI agents and his hasty, unplanned, and disorganized departure from the hotel support the inference that Hastings wanted to flee the scene.[23] Moreover, unlike the situation in *Beahm*, Hastings clearly was aware of the fact that the FBI had focused its investigation on him: Shorter's message to Pride indicated that the FBI wanted to talk to Hastings about bribery in his courtroom, that Borders had been arrested in connection with the bribery, and that Hastings should have a lawyer present at the time of questioning. The message could not have been more specific without naming the amount and date of the alleged bribe. And unlike the flight in *Myers*, Hastings' departure from the L'Enfant Plaza Hotel occurred as soon as he heard that the FBI wanted to talk to him. Thus, we conclude that it was proper to admit the evidence and let the jury determine its significance and qualitative value, if any.[24]

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*Accord, United States v. Hernandez-Miranda*, 601 F.2d 1104, 1106-07 (9th Cir. 1979). *Cf. Shorter v. United States*, 412 F.2d 428, 430 (9th Cir.) (not necessary to prove defendant was aware that he was being sought for crime to make evidence of flight three weeks after crime admissible), *cert. denied*, 396 U.S. 970, 90 S.Ct. 454, 24 L.Ed.2d 436 (1969).

[23] Neither the fact that Hastings was not legally compelled to talk to the FBI in Washington nor the fact that he eventually talked to them later in the day in Florida alters our conclusion. We view as important only Hastings' "instinctive or impulsive . . . behavior" upon hearing about Borders' arrest. *See United States v. Myers, supra.*

[24] In light of the fact that Hastings fled immediately *and* with an

In holding that the flight evidence was properly admitted, we do not suggest that this evidence alone was sufficient to show Hastings' criminal involvement so as to support Borders' conviction on the conspiracy count. Appellant does not raise a question as to the overall sufficiency of the evidence, but, to put the flight evidence into context, we note that the jury also had before it other circumstantial evidence tending to show that Hastings was involved—such as the timing and content of his telephone conversations with Borders.

Finally, appellant argues that, even if the flight evidence was properly admitted, it was error to instruct the jury on the issue. Quoting from *United States v. Robinson*, 154 U.S.App.D.C. 265, 475 F.2d 376, 384 (1973), he suggests that "[t]he interest of justice is perhaps best served if this matter [flight] is reserved for counsel's argument, with little if any comment from the bench." Yet the court in *Robinson* upheld a jury instruction on flight. *Id.* Further, we are aware of no case holding that such an instruction constitutes reversible error *per se*, and appellant offers no reason why we should adopt such a rule. To the contrary, we have consistently approved the inclusion of a jury instruction on flight. *E.g., United States v. Stewart, supra*, 579 F.2d at 359 & n. 3; *United States v. Clark*, 506 F.2d 416, 418 (5th Cir.), *cert. denied*, 421 U.S. 967, 95 S.Ct. 1957, 44 L.Ed.2d 454 (1975); *United States v. Register*, 496 F.2d 1072, 1077-78 (5th Cir. 1974), *cert. denied*, 419 U.S. 1120, 95 S.Ct. 802, 42 L.Ed.2d 819 (1975).

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awareness that he was the focus of a criminal investigation, we need not address the Seventh Circuit's suggestion that the existence of the second fact alone may be sufficient to support the admission of flight evidence. *See* note 22 *supra*.

The trial court instructed the jury as follows:

> There has been evidence in this case that on October 9, 1981, following Mr. Border's [sic] arrest in Arlington, Virginia, Mr. Hemphill Pride informed Judge Hastings that Mr. Borders had been arrested in connection with an alleged bribery in Judge Hastings' court and that FBI agents wished to interview him.
>
> The Government has argued to you that Judge Hasitngs' departure from the L'Enfant Plaza Hotel in Washington and his return in Miami without contacting the FBI agents shows a consciousness of guilt on his part. I therefore instruct you as follows:
>
> Intentional flight by a person immediately after a crime has been committed or after that person has been accused of a crime that has been committed is not, of course, sufficient in itself to establish the guilt of that person, but intentional flight under those circumstances is a fact which, if proved, may be considered by the Jury in the light of all the other evidence in the case in determining the guilt or innocence of that person.
>
> Whether or not Judge Hastings' conduct constituted flight is exclusively for you, as the Jury, to determine. And if you do so determine whether or not that flight showed a consciousness of guilt on his part and the significance to be attached to that evidence are also matters exclusively for you as a jury to determine.
>
> I do remind you that in your consideration of any evidence of flight, if you should find that there was flight you should also consider that there may be reasons for this which are fully consistent with innocence. There may be many reasons for a person to be unwilling to be interviewed by law enforcement agents which are perfectly innocent reasons, and in no way show any consciousness of guilt on the part of that person.
>
> And may I also suggest to you that a feeling of

> guilt does not necessarily reflect actual guilt of a crime which you may be considering.

This instruction correctly cautioned the jury that it was up to them to determine whether the evidence proved flight and the significance, if any, to be accorded such a determination; it also properly explained the potential weaknesses in the *Myers* chain of inferences described earlier. *See Clark, supra; Register,supra.* We find no error in the instruction.

III.

[2, 3] Several character witnesses testified at trial as to Borders' good reputation and character. This evidence was, according to appellant, the "essence" of his defense. At the conclusion of the trial, the court instructed the jury in part as follows:

> Now, the Defendant in this case has called character witnesses in this case who have testified as to Mr. Borders' good reputation for honesty, integrity, probity and morality and also have given their personal opinions as to his good character. You should understand that, of course, a good reputation is not a defense to a criminal charge. Nevertheless, the law allows such evidence of character, and you should consider it along with all the other evidence in this case since evidence of a defendant's good character may give rise to a reasonable doubt that such a person would commit a crime with which he is charged. But if on all the evidence you are satisfied beyond a reasonable doubt that the Defendant is guilty, a showing that he has previously enjoyed a reputation of good character will not justify or excuse the offense, and you should not acquit the Defendant merely because you believe he may have been a person of good repute. In this connection, I further charge you that the testimony of a character witness is not to be regarded by you as expressing that witness' opinion as to the guilt or innocence of the Defendant of the

> offense with which he is charged. The guilt or innocence of Mr. Borders in this case is for you the jury and for you alone to determine from all the evidence in this case.

Appellant alleges two errors in this instruction: first, the inclusion of the phrase "a showing that he has previously enjoyed a reputation of good character will not justify or excuse the offense," and second, an asserted failure to state that character or reputation evidence should be considered along with all of the other evidence in the case.[25] We review these alleged errors with the understanding that "so long as the charge accurately reflects the law and the facts, the district judge is vested with broad discretion in formulating his charge." *United States v. Ruppel,* 666 F.2d 261, 273-74 (Former Fifth Cir. Unit A), *cert. denied,* —— U.S. ——, 102 S.Ct. 3487, 73 L.Ed.2d 1369 (1982).

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[25] Appellant does not indicate to this Court, however, the degree of prejudicial effect, if any, of the alleged errors and ignores the district court's suggestion that if there was error, it was harmless. The district court reasoned as follows:

> In any event, the Court is convinced that any error in the character instruction was harmless and could not in any way have prejudiced the defendant. Not only was the evidence of defendant's guilt overwhelming, but the testimony as to Border's good character was inconsistent with his defense. In closing argument, defendant's counsel focused on asserted weaknesses in the government's proof that Hastings was aware of Border's activities, and expressly suggested to the jury that Borders was playing a "scam" on the Romanos, that Hastings was not involved in the scam, and that therefore no conspiracy to commit bribery had been proved. Trial Transcript 1109-10. To accept this argument the jury would have had to disbelieve the character evidence. Under these circumstances, and considering the weight of the uncontradicted evidence offered by the government at trial, it is inconceivable that a different instruction on Borders' character evidence would have resulted in an acquittal in this case.

Because we hold that there was no error in the instruction, we need not address the correctness of the district court's reasoning.

The general rule as to character or reputation evidence was established in *Edgington v. United States,* 164 U.S. 361, 17 S.Ct. 72, 41 L.Ed. 467 (1896), in which the Supreme Court announced that a jury instruction must clearly indicate that the jury should consider such evidence in the same manner as it considers all other evidence. Relying in part on *Edgington,* the Fifth Circuit in *United States v. Leigh,* 513 F.2d 784 (5th Cir. 1975), overturned a conviction because an otherwise satisfactory instruction on reputation evidence concluded with the statement that

> evidence of good reputation should not constitute an excuse to acquit the defendant if you, the jury, after weighing all of the evidence in the case, is convinced beyond a reasonable doubt that the defendant is guilty of the offenses charged in the indictment.

Focusing on the phrase "after weighing all of the evidence in the case," the court concluded that the instruction had improperly conveyed the impression that reputation evidence was to be considered only if the case was otherwise close. The impact of the error was exacerbated, the court stated, by the fact that the defective statement appeared at the end of the instruction. The *Leigh* court was also "troubled" by the use of the word "excuse," which impermissibly suggested "that if the jurors let the defendant go free on the basis of such evidence, they would be 'excusing' his commission of the crime rather than acquitting him of it." *Id.* at 786.

Since *Leigh* the Fifth Circuit has further refined its analysis of character and reputation instructions. In *United States v. Furr,* 528 F.2d 578 (5th Cir. 1976), we approved an instruction on reputation evidence that contained the following statement:

> However, evidence of good reputation should not constitute an excuse to acquit a defendant if you, after weighing all of the evidence, *including evidence*

> *of good character,* are convinced beyond a reasonabe doubt that the defendant is guilty of the crime charged in the indictment.

Shortly afterwards, another panel of the Fifth Circuit in *United States v. Lange,* 528 F.2d 1280, 1287 n. 12 (5th Cir. 1976), upheld an instruction on character evidence that contained an almost identical statement. Yet except for the portion in italics, these instructions were in relevant part the same as the instruction in *Leigh.* But according to the *Lange* and *Furr* panels, adding the phrase "including evidence of good character" cured the evil of the *Leigh* instruction by putting the juries on notice that character evidence should be treated the same as other evidence. As we later stated in *United States v. Callahan,* 588 F.2d 1078, 1085 (5th Cir.), *cert. denied,* 444 U.S. 826, 100 S.Ct. 49 62 L.Ed.2d 33 (1979), "*Furr* and *Lange* present independent interpretations of *Leigh* that endorse the distinction between telling the jury to consider character evidence after considering the other evidence and telling the jury to consider character evidence together with all the other evidence." Both courts also suggested that the use of the word "excuse" was troubling, but they held that its inclusion was not reversible error.[26]

The jury instruction as to the character evidence in the present case properly follows the distinction established in *Lange* and *Furr* and described in *Callahan.* The trial court instructed that "the law allows such evidence of character, and you should consider it *along with all the*

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[26] Shortly after these cases were decided, another panel of the Fifth Circuit in *United States v. Harris,* 533 F.2d 306 (5th Cir. 1976) reversed a conviction in which an instruction identical to that in *Lange* and *Furr* was used. The *Harris* opinion, however, contained no discussion or analysis, did not mention *Lange* or *Furr,* and cited only to *Leigh.* In *United States v. Callahan, supra,* the court attempted to reconcile *Lange, Furr,* and *Harris* and ended up following the first two and disapproving *Harris.* See 588 F.2d at 1085-86.

*other evidence in this case* since evidence of a defendant's good character may give rise to a reasonable doubt that such a person would commit a crime with which he is charged." (emphasis added). This clearly indicated to the jury that the character evidence should be weighed along with, not "after," the other evidence in the case. And as in *Lange* and *Furr*, we decline to hold upon consideration of the charge in its entirety that the mere presence of the word "excuse" negates the clear meaning conveyed by the character instruction as a whole. As we said in *United States v. Ruppel, supra*, 666 F.2d at 273, "[t]here is, of course, no ritualistic incantation or magic formula that the judge must recite in his charge on character evidence." So long as the jury was not given the impression that character evidence should be treated differently than the other evidence, the instruction clearly was not an abuse of the trial court's broad discretion. *Id.* at 273-74.

AFFIRMED.

## QUESTION PRESENTED

Whether due process was violated by admission of evidence of the flight of petitioner's alleged co-conspirator upon learning of petitioner's arrest.

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# In the Supreme Court of the United States

OCTOBER TERM, 1982

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No. 82-1286

WILLIAM A. BORDERS, PETITIONER

*v.*

UNITED STATES OF AMERICA

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT*

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

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### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A6-A30) is reported at 693 F.2d 1318. The opinion of the district court (Pet. App. A1-A5) is not reported.

### JURISDICTION

The judgment of the court of appeals was entered on December 10, 1982. A petition for a writ of certiorari was filed on January 25, 1983. The jurisdiction of this Court is invoked under 28 U.S.C.1254(1).

### STATEMENT

Following a jury trial in the United States District Court for the Northern District of Georgia, petitioner was convicted of conspiring with United States District Judge Alcee L. Hastings to solicit and accept a bribe in exchange for influencing the outcome of a case pending in Judge Hastings' courtroom, in violation of 18 U.S.C. 371 (count 1);

corruptly impeding the administration of justice, in violation of 18 U.S.C. 1503 and 2 (count 2); and travelling in interstate commerce with intent to commit bribery, in violation of 18 U.S.C. 1952 (counts 3 and 4). He was sentenced to concurrent terms of 5 years' imprisonment on each count and a $35,000 fine.

The evidence at trial is detailed in the court of appeals' opinion. It showed that in December 1980, Frank Romano and Thomas Romano were convicted after a jury trial in Judge Hastings' courtroom on 21 counts of racketeering and related charges. On May 4, 1981, Judge Hastings ordered the forfeiture of $1.2 million worth of the Romanos' racketeering-related property pursuant to 18 U.S.C. 1963(a) (Pet. App. A7-A8).[1]

In September 1981, the FBI began an investigation into the Romano proceedings after receiving tips from one William Dredge, an informant who was a former client of petitioner. On September 10, Dredge arranged to introduce petitioner to "Frank Romano" on September 12 at the Miami International Airport. Petitioner later placed two calls to Judge Hastings' chambers in Miami. On September 11, Hastings telephoned petitioner from a pay phone at the Miami airport and left a message with petitioner's secretary

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[1] At the Romanos' sentencing hearing on July 8, 1981, Judge Hastings considered whether a recent Fifth Circuit opinion, *United States* v. *Martino*, 648 F.2d 367 (1981), which reversed a forfeiture order similar to the one entered in the Romanos' case, mandated the reversal of the May 4 forfeiture order. Judge Hastings upheld the forfeiture order after hearing extensive argument on the meaning of *Martino* (Pet. App. A13-A14).

On August 2, 1982 — well after the Romano forfeiture proceedings had run their course — the Fifth Circuit, sitting en banc in *Martino*, vacated the portion of the panel decision that reversed the trial court's forfeiture order, and affirmed the order as entered. 681 F.2d 952. This Court has since granted certiorari on the issue *sub nom. Russello* v. *United States*, No. 82-472 (Jan. 10, 1983).

that his flight was delayed and he would not leave until 5 p.m. Petitioner accordingly changed his flight to Miami from a 7:30 p.m. departure to a flight that left later that night. This change provided Hastings and petitioner with time to meet at National Airport when Hastings' flight arrived at 8:00 p.m. (Pet. App. A8).

On September 12, Dredge and a retired FBI agent Paul Rico, who was posing as Frank Romano, met petitioner at a restaurant at the Miami airport. Petitioner asked Rico/Romano, who was wearing a concealed body recorder, whether he knew "what the number" was. When Rico hesitated, petitioner wrote "$150,000"[2] on a piece of paper and then wrote "within 10 days an order will be signed returning a substantial amount of property." Petitioner also told Rico that the "other" — apparently referring to reduced prison sentences — would come after Rico/Romano withdrew a pending appeal and filed a motion for mitigation of sentence in the district court (Pet. App. A8-A9).[3]

At a second meeting in Miami on September 19, Rico gave petitioner an envelope containing $25,000 in $100 bills

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[2]In reprinting the court of appeals' opinion, the appendix to the petition mistakenly recites a different figure. Compare Pet. App. A9 with 693 F.2d at 1320.

[3]Petitioner also suggested that Rico name a time and place for Judge Hastings to have dinner the following week. If Judge Hastings was then observed having dinner at the restaurant of Rico's choice, Rico would be certain that petitioner had influence with Judge Hastings. Rico accordingly named the main dining room at the Fontainbleu Hotel at 8 p.m. on September 16. Thereafter, FBI agents observed Judge Hastings arrive for dinner at the main dining room of the Fontainbleu at 7:45 p.m. on September 16 (Pet. App. A9-A10).

At approximately the same time, Judge Hastings told his law clerk to draft an order returning the Romanos' money after the clerk had informed him that the Fifth Circuit had followed the panel decision in the *Martino* case in *United States* v. *Peacock*, 654 F.2d 339, 351 (5th Cir. 1981). Pet. App. A13-A14.

as "up front" money; they agreed that Rico would pay the remainder of the money at a later time. Petitioner told Rico that the forfeited property would be released within 10 days (Pet. App. A10-A11).

On Friday, October 2, Rico called petitioner and inquired into the status of the forfeiture order. Petitioner replied that he was uncertain and suggested that Rico call him at home on Sunday, October 4. Petitioner then attempted to call Judge Hastings, but Hastings' secretary stated that he had left for the day. Rico telephoned petitioner again on Sunday morning, but petitioner said that he still "had [not] been able to talk to anybody" and suggested that Rico call him at the office the next day (Pet. App. A12).

The following day, October 5, Judge Hastings instructed his law clerk to "[d]o the order [returning the Romanos' money] * * * today" (Pet. App. A14).[4] When Rico called petitioner at 4:30 p.m., petitioner said that "the matter" had "been taken care of" and that Judge Hastings' order would probably be mailed out that day or the following morning. Shortly afterwards, Judge Hastings called petitioner and reported that he had "drafted all those * * * letters * * * for him."[5] Hastings promised that he would "send the stuff off to Columbia in the morning." The next day, Judge Hastings issued an order that reversed in part the original $1.2 million forfeiture order, returning more than $845,000 in forfeited property to the Romanos (Pet. App. A12-A13).

Rico called petitioner twice the next day — once to inquire about the status of the order and later to report that he had received word of the order and was satisfied. They

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[4]According to the clerk's testimony such behavior was "unusual" for Judge Hastings and "not in the ordinary course of things" (Pet. App. A14).

[5]Court authorized wiretaps were installed on petitioner's office and home telephones on October 2 (Pet. App. A12).

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No. 82-1286

# In the Supreme Court of the United States

OCTOBER TERM, 1982

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WILLIAM A. BORDERS, PETITIONER

*v.*

UNITED STATES OF AMERICA

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT*

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

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then agreed that the final payoff would occur on October 9 in Washington, D.C. (Pet. App. A14).

The National Bar Association planned to honor petitioner, its former president, with a testimonial dinner in Washington on October 9. The day before, Judge Hastings called petitioner to say that he would arrive in Washington at 10:40 the next morning. Petitioner picked Hastings up at the airport on October 9 and the two drove to the L'Enfant Plaza Hotel, where they had reserved a suite and an adjoining room. Thereafter, petitioner and Hastings went to petitioner's law office, where petitioner received a message to call "Frank" (Rico) at a local Marriott Hotel. Petitioner returned the call from his office and agreed to meet Rico at once at the Marriott. Rico told petitioner that he had brought "all the necessary papers" (Pet. App. A14-A15).

Petitioner left Judge Hastings at his office and drove to the Marriott. After Rico told petitioner that "it" was in the room, petitioner told him to get "it" and take a ride with him in petitioner's car. The two got into petitioner's car and Rico placed a bag containing $125,000 in the seat between them. FBI agents pulled them over as soon as petitioner started to drive out of the parking lot (Pet. App. A15).

In the meantime, Judge Hastings returned to the hotel and had drinks with Hemphill Pride, a mutual friend of Hastings and petitioner, who had come to Washington to attend the dinner. When Pride returned to his hotel room he received a telephone call from petitioner's attorney, John Shorter. Shorter informed Pride that petitioner had been arrested on charges relating to bribery that took place in Hastings' courtroom and that the FBI wanted to interview Hastings (Pet. App. A16).

Pride next telephoned Hastings in his room and told him that he had an important message. The two met outside a hotel elevator, where Pride related Shorter's phone call.

According to Pride's testimony, Hastings' reaction was one of shock. Pride advised Hastings to return to Miami, where he would be in a "better position" than in Washington. The two then proceeded to Hastings' room, where Pride helped Hastings pack his clothes. Pride offered to give Hastings a ride to the airport, but Hastings declined, saying that he did not want Pride to "get involved." Hastings then left the hotel without paying his bill or picking up a suit he had left at the hotel cleaners. Instead of taking the next flight to Miami from nearby National Airport, however, Hastings travelled to Baltimore-Washington International Airport, 32 miles northeast of the hotel, to take a later flight and did not arrive in Miami until later that night (Pet. App. A16-A17).

From the Miami airport, Hastings went to his fiancee's home and arrived there between 9:30 and 10:00 p.m. Soon afterwards, two FBI agents arrived and interviewed Hastings for two to three hours (Pet. App. A17-A18).

## ARGUMENT

The evidence in this case indisputably established that petitioner solicited and accepted a $150,000 bribe for the purpose of influencing Judge Hastings' action in a pending case. Because petitioner was not himself a public official, he was charged with conspiring with Judge Hastings in the bribery scheme. The critical issue for the jury's determination at trial was therefore whether this was simply a fraud scheme executed by petitioner on his own, in which case he would not be guilty of conspiracy, or whether Judge Hastings was a culpable participant in the scheme. It was to show this latter point that the prosecution introduced the challenged evidence. Petitioner contends (Pet. 8-10) that the evidence of Judge Hastings' precipitous departure upon learning of petitioner's arrest was inadmissible. The court of appeals correctly rejected this argument, ruling that admissibility of such evidence is within the discretion of the trial

judge, whose rulings on such a matter will not be overturned absent clear abuse. Further review by this Court is not warranted.

Petitioner appears (Pet. ii, 9) to focus his objection to admission of this evidence on the fact that it involved actions subsequent to the termination of the conspiracy by petitioner's arrest. As the court of appeals observed (Pet. App. A19 n.18), this Court has distinguished between post-conspiracy *declarations* of a conspirator, which are ordinarily not admissible against a co-conspirator, and post-conspiracy acts of a conspirator. Acts that are not intended to be a means of expression are admissible; they are not hearsay and need not be excluded simply because they occur after the conspiracy has terminated. *Lutwak* v. *United States*, 344 U.S. 604, 617-618 (1953). As in *Lutwak*, evidence of Judge Hastings' hurried departure from Washington was admissible to prove his involvement in and the existence of a conspiracy. See, *e.g.*, *United States* v. *McLaughlin*, 578 F.2d 1180, 1184 (5th Cir. 1978).

Petitioner seeks to avoid this principle by arguing (Pet. 9-10) that Judge Hastings' flight was assertive conduct, *i.e.*, nonverbal conduct that was intended as a substitute for oral or written expression. It is true that evidence of conduct that is simply a substitute for a verbal declaration is inadmissible if evidence of the declaration could not be admitted.[6] But while Judge Hastings' behavior could properly be taken to show a consciousness of guilt on his part, it is frivolous to suggest that the behavior was designed to make

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[6]Such conduct, for example, as "pointing to identify a suspect in a lineup, is clearly the equivalent of words, assertive in nature, and to be regarded as a statement." Fed. R. Evid. 801(a) advisory committee note. See, *e.g.*, *United States* v. *Morris*, 623 F.2d 145, 148 n.1 (10th Cir.), cert. denied, 449 U.S. 1065 (1980); *United States* v. *Perez*, 658 F.2d 654, 659 (9th Cir. 1981).

the statement "I am guilty," which would be necessary to support petitioner's equation of the act of fleeing with *assertive* conduct.

Thus, evidence of flight is correctly regarded as conduct lacking in direct assertive value. See *United States* v. *Lobo*, 516 F.2d 883, 884 n.1 (2d Cir.), cert. denied, 423 U.S. 837 (1975) ("[w]hile a flight [may be viewed as an admission and therefore] not hearsay," * * * [p]referably it is to be viewed as conduct offered as circumstantial evidence rather than for its assertive testimonial value"); see also *McCormick's Handbook on the Law of Evidence* § 262, at 629 (E. Cleary 2d ed. 1972). This view was reflected in the trial court's instructions that the jury could consider the flight as evidence of a consciousness of guilt on the part of Judge Hastings but that it could also determine that there might be innocent reasons—not related to a consciousness of guilt—for his unwillingness to be interviewed immediately by law enforcement agents (Tr. 1167-1168; Pet. App. A25-A26). Hence, as the court below concluded, the evidence was admissible under *Lutwak*, and the district court did not abuse its discretion in admitting it as post-conspiracy conduct providing circumstantial evidence of participation in the conspiracy.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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